IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.2416 OF 2003

M/s.B.E. Billimoria & Co. Ltd. ...Petitioner.

Versus

Kanhaiya Singh & Ors. ...Respondents.

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Mr. A. D. Shetty with Ms. Rita Joshi for the Petitioners.
Mr. Rajesh Gehani for Respondent No.1.

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CORAM : DR. D.Y. CHANDRACHUD, J.

August 7, 2006.

P.C.:

The Labour Court has in a reference under Section 10 of the Industrial Disputes Act, 1947, set aside the termination of the services of the First Respondent and has directed the Petitioner to reinstate the workman with continuity of service and full back wages.

2. The claim of the First Respondent for reinstatement and full back wages with continuity of service was referred for adjudication to the Labour Court by the State Government. The contention of the First Respondent in his statement of claim was that the Petitioner which engages in the business of Civil Engineering and Building

Construction engaged over 1000 workmen in different capacities. The First Respondent claimed that he had been employed as a helper for a period of 18 months and his last drawn wages were Rs.45/- per day. The First Respondent claimed that a person by the name of Vishwanath Sahu was shown as Sub Contractor but this was only on paper and there was no valid contract between the Contractor and the Petitioner. According to the workman, the Petitioner had no licence to appoint contract labour. The First Respondent claimed that his work was to carry gunny bags of cement from one place to another and that he was supervised by a permanent employee of the Petitioner. The First Respondent claimed that payments to him were made by the Petitioner in its establishment through a representative of the Company. In sum and substance, therefore, it was alleged that the Sub-Contractor was not genuine and the arrangement was bogus and sham. According to the First Respondent, he was denied the benefit of service conditions such as privilege leave, bonus and over time and when he made a demand for the benefit thereof, his services were orally terminated on 28th January 1997 without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947.

3. A Written Statement was filed by the Petitioner denying that the contractual arrangement under which the First Respondent was employed was bogus and sham. The Petitioner submitted that since the Contractor was employing less than 20 employees, he did not require any licence for engaging contract labour. The Petitioner denied that it employed over a thousand workers; that the work of the First Respondent was supervised by a permanent employee of the Petitioner; and that payments were made to the First Respondent by the Petitioner. The Petitioner denied that the services of the First Respondent were terminated by it. The contention of the Petitioner was that the entire case that had been set up in the Reference was contrary to the case of the First Respondent in an application for claiming compensation under the Workmen's Compensation Act, 1923.

4. From the material on the record, it would appear that the First Respondent had during the course of his duty, met with an accident on 30th December 1995. He filed an application for

compensation under the Workmen's Compensation Act, 1923 on 1st August 1997. In the application, the First Respondent specifically stated that he was employed by opposite Party No.2 thereto who, it must be noted, was Vishwanath Sahu, the Sub-Contractor. Therefore, the application proceeded clearly on the basis that the First Respondent was an employee of the aforementioned Contractor.

5. In the Written Statement filed by the Petitioner on 9th February 1998 to the application for workmen's compensation, the Petitioner also set up the case that the First Respondent was employed by the Contractor; that he had suffered an injury at the work site on 30th December 1995 upon which an officer of the Petitioner had taken him to Hospital. The Petitioner averred that the Company had obtained an Insurance Policy so as to provide for coverage for all the workers working at the work site. The Commissioner for Workmen's Compensation has allowed the claim of the First Respondent in the amount of Rs.1,75,697/- by an order dated 28th June 2005. Counsel appearing on behalf of the First Respondent submitted that the Insurance Company has recently filed a First

Appeal before this Court.

6. Evidence was adduced before the Labour Court. The Labour Court came to the conclusion that the Written Statement filed by the Petitioner in the application of the First Respondent for workmen's compensation contained an admission to the effect that the First Respondent was an employee of the Petitioner. In that view of the matter, the Labour Court held that the statement by the First Respondent in his application for workmen's compensation to the effect that he had been engaged by the Contractor should be disregarded since it was a statement by an illiterate employee. On this footing, the Labour Court held hat the Petitioner illegally dispensed with the services of the First Respondent without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 and that an order of reinstatement with full back wages and with continuity of service was warranted.

7. On behalf of the the Petitioner, it has been submitted that the order passed by the Labour Court has clearly ignored the pleading

of the First Respondent himself in the application for workmen's compensation. Moreover, it was submitted that the evidence of the First Respondent in the course of the Reference would clearly reveal that he was employed by the Contractor and it was urged that there is absolutely no material to show that the contract arrangement was sham and bogus. On the other hand, it was submitted that the management's witness specifically deposed that the First Respondent was a contract workman and despite opportunity, the witness who had deposed on behalf of the management was not cross-examined by the First Respondent.

8. On behalf of the management, evidence was adduced of Ashish Manilal Desai who was working as an Engineer since 1984. The witness deposed that between 1995 and 1997 the management had appointed six contractors at its work site. The Contractors executed the actual work of construction. The witness stated that the First Respondent herein was known to him because he was working with the Sub-Contractor. All the contract workmen were covered under an Insurance Policy. The First Respondent met with an

accident while lifting cement bags and an accident report for the purposes of Insurance was signed by the witness who was working as an Engineer at the site. The witness stated that it was the Contractor who used to pay the wages of contract labour. As noted above, the management's witness was not cross-examined despite opportunity.

9. The First Respondent in the course of his Examination-in-Chief stated that his services were terminated by the Company's Engineer, Shri Desai. However, in the course of his cross-examination, when the witness was confronted with his application for workmen's compensation, he specifically admitted that he was engaged by the Contractor. The workman admitted that the contents of the aforesaid application were true and correct; that it bore his signature; and that it had been drafted according to his instructions. The workman admitted that he had no documentary evidence to show that he was working with the Petitioner. He further admitted that he was supplied with an attendance card by the Contractor and that he was paid by the Contractor or by his son.

10. On this state of the record, what emerges is that the First Respondent had in the course of his pleadings in the application for workmen's compensation specifically admitted that the relationship of employer and employee existed between him and the contractor. Undoubtedly, in the subsequent reference under Section 10 of the Industrial Disputes Act, 1947, it was open to the workman to establish that the Contract between the Petitioner and the Contractor was sham and bogus in which case, the real relationship of employer and employee would be between the workman and the Petitioner. There is, however, no evidence on the record to establish that the contractual arrangement was sham and bogus. The First Respondent admitted that an attendance card was supplied to him by the Contractor and that the payment of wages to him was effected by the Contractor. The First Respondent stated that he had no documentary evidence to establish that he was an employee of the Petitioner.

11. Despite the absence of any evidence in support of the claim of the First Respondent that the contract under which he was engaged was sham and bogus, the Labour Court allowed the

Reference principally on the basis of the averments contained in the Written Statement filed by the Petitioner before the Commissioner for Workmen's Compensation. Now, a perusal of the pleadings in the proceedings before the Commissioner for Workmen's Compensation is sufficient to demonstrate that the finding of the Labour Court is ex-facie erroneous and contrary to the record. In the application before the Commissioner for Workmen's Compensation it was the case of the First Respondent himself that he was engaged by the Contractor. In reply to the aforesaid application the Petitioner also stated that the workman had been employed by Opposite Party No.2 who was the Contractor. The Written Statement of the Petitioner before the Commissioner inter alia dealt with the Insurance Policy that was taken out by the Petitioner to cover all the workmen at various work sites. Section 12 of the Workmen's Compensation Act, 1923, provides that where any person in the course of trade or business enters into a contract with any other person for the execution by or under the Contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, it is the principal who shall be liable to pay the compensation to the workmen employed in

the execution of the work. Under sub-section (2) of Section 12, however, where the principal is liable to pay compensation, he shall be entitled to be indemnified by the Contractor. The Petitioner had obtained an Insurance Police to cover all the workmen at its work site. However, the action taken by the Petitioner in fulfillment of its obligation under the Workmen's Compensation Act, 1923, does not establish a relationship of employer and employee between the Petitioner and the First Respondent. There was no admission in the Written Statement filed before the Commissioner for Workmen's Compensation to the effect that the First Respondent was an employee of the Petitioner.

12. In these circumstances, the award of the Labour Court is clearly unsustainable and will have to be interfered with in the exercise of the jurisdiction under Article 227 of the Constitution. During the course of these proceedings, Counsel appearing on behalf of the Petitioner has placed before the Court, a copy of the communication dated 8th September 2003 addressed by the Contractor of the Petitioner to the First Respondent calling upon him

to report for work with immediate effect. In pursuance of the aforesaid letter dated 8th September 2003, if the First Respondent does present himself for work, the contractor shall sympathetically consider providing work suitable to the medical condition of the First Respondent subject to the availability of work and a certification of his fitness by a Medical Authority. For all these reasons, and subject to the aforesaid clarification, the petition is allowed and the impugned award dated 3rd April 2003 of the Labour Court is quashed and set aside. There shall be no order as to costs.

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